



OLR RESEARCH REPORT

August 22, 2012

2012-R-0341

OLR BACKGROUNDER: ARIZONA V. UNITED STATES

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You asked for a summary of the U.S. Supreme Court's decision in *Arizona v. United States* (132 S.Ct. 2492, 2012).

SUMMARY

On June 25, 2012, in a majority opinion written by Justice Anthony Kennedy, the U.S. Supreme Court upheld injunctions on three out of four provisions of Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act," also known as SB 1070 because they were preempted by federal law. Specifically, the Court enjoined the provisions:

1. making failure to comply with federal alien registration requirements a state misdemeanor (section 3);
2. making it a state misdemeanor for an unauthorized alien to work in the state (section 5(C)); and
3. authorizing officers to arrest without a warrant a person the officer has "probable cause to believe...has committed any public offense that makes the person removable from the United States" (section 6).

The Court ruled that the fourth provision was not preempted. This provision requires officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government section (section 2(B)). Although it upheld the fourth provision, it cautioned that it may be subject to additional constitutional and preemption challenges once the law goes into effect, depending on how it is applied in practice.

Justices Antonin Scalia, Clarence Thomas, and Samuel Alito wrote separate opinions, each concurring and dissenting in part.

FACTS

On April 23, 2010, Arizona Governor Janice Brewer signed Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," into law. The bill's stated intent was "to make attrition through enforcement the public policy of all state and local government agencies in Arizona." In other words, the bill was intended to impose so many restrictions on illegal immigrants in Arizona that they would willfully return to their countries of origin.

Less than three months after the bill signing, the U.S. government challenged SB 1070's constitutionality in federal court.

PROCEDURAL HISTORY

On July 6, 2010, the United States Department of Justice filed a complaint in Arizona's U.S. District Court arguing that SB 1070 was unconstitutional. It also filed a motion requesting a preliminary injunction to prevent the bill from taking effect. The district court refused to enjoin the entire bill, but found that federal law preempted the provisions:

1. requiring officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government (section 2(B));
2. making failure to comply with federal alien registration requirements a state misdemeanor (section 3);
3. making it a misdemeanor for an unauthorized alien to work in the state (section 5(C)); and

4. authorizing officers to arrest without a warrant a person the officer has “probable cause to believe...has committed any public offense that makes the person removable from the United States” (section 6).

The Ninth Circuit Court of Appeals affirmed the district court’s ruling on April 11, 2011. The U.S. Supreme Court then agreed to hear the case and oral arguments took place on April 25, 2012.

SUPREME COURT OPINION

The Supreme Court issued its opinion on June 25, 2012. The majority opinion, written by Justice Anthony Kennedy, upheld the injunctions on all but one of the provisions. Justices Alito, Scalia, and Thomas filed separate opinions, all concurring in part and dissenting in part.

The majority explained that federal law preempts state law when (1) a federal statute contains an express preemption provision, (2) Congress has determined that it has exclusive power to regulate conduct in a particular field (field preemption), or (3) a state law conflicts with a federal law (conflict preemption).

The Court noted that the federal government has “broad, undoubted power over immigration and alien status” (*Id.* at 2494). It analyzed each of the four enjoined provisions and found that all but one were preempted by federal immigration and naturalization laws.

Verifying Immigration Status—Section 2(B)

Majority Opinion. The majority found that the lower court had improperly enjoined section 2(B). It noted that the provision includes three limitations:

1. A detainee is presumed not to be an alien unlawfully present in the U.S. if he or she presents a valid Arizona driver’s license or similar ID.
2. Officers are prohibited from considering race, color, or national origin when enforcing the provision, except to the extent permitted by the U.S. and Arizona Constitutions.

3. The provision must be “implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens” (*Id.* at 2496).

The majority noted that (1) the mandatory status checks do not interfere with the federal immigration scheme and (2) communication between state and federal officials is an important part of that scheme. The federal government encourages state officials to share information about possible immigration violations. Thus, the majority reasoned that section 2(B) does not interfere with the federal immigration scheme.

The majority did, however, caution that the law, once implemented, may in practice require state officers to delay a detainee’s release for no other reason than to verify his or her immigration status. Such a practice could potentially interfere with the federal scheme and violate the Fourth Amendment’s prohibition against unreasonable searches and seizures.

Concurring Opinions. Justices Scalia, Thomas, and Alito each agreed with the majority’s decision that section 2(B) is not federally preempted. Neither Thomas nor Alito addressed the majority’s cautionary statement about the possible constitutional challenges once the statute is put into practice. Justice Scalia, however, stated that the Fourth Amendment had nothing to do with the case at hand.

Violation of Federal Registration Law as a State Misdemeanor - Section 3

Majority Opinion. The majority stated that Congress has exclusive power to regulate alien registration. Section 3 adds a state penalty to behavior already proscribed by federal law. The majority cited its holding in *Hines v. Davidowitz*, 313 U.S. 52 (1941) as precedent. In *Hines*, the Supreme Court found that Pennsylvania could not enforce its own alien registration program because Congress had created a federal alien registration plan with the intent that it would be a “single integrated and all-embracing system” (*Id.* at 74). Since Congress has exclusive power to regulate conduct in the field of alien registration, even a complementary state statute is not permissible.

Dissenting Opinions. Justice Scalia disagreed with the majority and refuted the majority's interpretation of *Hines*. He claimed that the Court in *Hines* ruled that states could not establish their own additional alien registration requirements. Scalia argued that section 3 does not establish additional requirements; rather, it makes failure to register and failure to carry evidence of registration, both of which are already federal law violations, state law violations as well.

Justice Thomas also disagreed with the majority. He argued that nothing in the relevant federal statutes indicates that Congress intended to make the federal government exclusively responsible for enforcing alien registration requirements.

Concurring Opinion. Justice Alito agreed (1) with the majority's interpretation of *Hines* and (2) that section 3 is preempted.

State Misdemeanor for an Unauthorized Alien Working in Arizona - Section 5(C)

Majority Opinion. The federal Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for employers to employ unauthorized workers. The IRCA also imposes civil penalties on the unauthorized workers. The majority argued that "IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work – aliens who already face the possibility of employer exploitation because of their removable status – would be inconsistent with federal policy and objectives" (*Arizona* at 2504). Although the federal and state statutes share the common goal of preventing unauthorized worker employment, the state statute subjects the workers to possible criminal penalties while the same workers would only face civil penalties under IRCA. Because of this conflict in enforcement methods, IRCA preempts section 5(C).

Dissenting Opinions. Justice Scalia argued that Congress' decision not to impose criminal penalties on unauthorized workers does not equate to a decision prohibiting the states from imposing criminal penalties.

Justice Thomas argued that nothing in the text of the federal immigration laws prohibits states from imposing criminal penalties on unauthorized workers.

Justice Alito argued that because state police powers are implicated, the Court's precedents require it to presume that federal law does not displace state law unless that is clearly Congress' intent. He argued that Congress has not clearly prohibited the states from imposing criminal penalties on unauthorized workers, and therefore section 5(C) should not be preempted.

Warrantless Arrest By Others With Probable Cause to Believe A Person is Removable from the U.S. - Section 6

Majority Opinion. The majority stated that, as a general rule, it is not a crime for a removable alien to remain in the United States. In limited circumstances, the U.S. attorney general may issue a warrant for trained federal immigration officers to arrest an alien. Without a warrant, the federal immigration officers have very limited authority. Federal law also specifies when state officers may perform immigration functions. Section 6 would give the state officers greater arrest authority than the federal immigration officers, which they could exercise without federal government instruction. The majority found that section 6, like section 3, was preempted because it violates the principal that Congress has exclusive power to regulate conduct in the field of alien registration.

Dissenting Opinions. Justice Scalia reiterated his contention that Arizona is entitled to have its own immigration policy, as long as it does not conflict with federal law. He noted that federal law allows state officers to "cooperate with the attorney general in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States" and such cooperation requires neither prior federal approval nor identical efforts (8 USC § 1357(g)(10)(B)). He argued that section 6 is consistent with this federal law provision, because it enables state officers to arrest a removable alien, contact federal immigration authorities, and follow their lead on what to do next. The arrest would not begin removal proceedings unless the federal government authorizes it.

Justice Scalia further argued that although it is not a federal crime for a removable alien to remain in the United States, there is no reason that Arizona cannot make it a state crime for a removable alien to remain in Arizona. He reiterated the point that Arizona is entitled to have its own immigration policy, as long as it does not conflict with federal law. Section 6 does not create such a statutory conflict and, therefore, the Court's determination that the provision was federally preempted is incorrect.

Justice Thomas agreed with Scalia's dissenting opinion. He added that states, as sovereigns, have the authority to make arrests for law violations and no federal statute withdraws that authority.

Justice Alito also agreed that section 6 should not be preempted. He noted that current Arizona law permits warrantless arrests for felonies, misdemeanors committed in the officer's presence, petty offenses, and certain traffic-related criminal violations. He argued that section 6 would add very little to the officer's authority. He referred to *Miller v. United States*, 357 U.S. 301 (1958), a case in which a D.C. officer, accompanied by a federal officer, made a warrantless arrest based on a suspected federal narcotics offense. The D.C. officer had the authority to make the warrantless arrest, but the federal officer did not. In that case, the court found that "[w]here a state or local officer makes a warrantless arrest to enforce federal law... 'the lawfulness of the arrest without warrant is to be determined by reference to state law'" (*Arizona* at 2536).

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